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No. 75-58

In the Supreme Court of the United States

OCTOBER TERM, 1975

DICK JONES, ET AL., PETITIONERS

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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STATEMENT

Petitioners are residents of buildings owned by the District of Columbia Redevelopment Land Agency.[1] On November 13, 1972, they filed an original complaint and motion for a preliminary injunction in the United States District Court for the District of Columbia, invoking the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C.

[1] There are three petitioners: Dick Jones, Govan Sanders and James Washington. The plaintiffs below also included William H. Patterson, who died on September 20, 1974.

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4321 *et seq.*; the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. 4601 *et seq.*; and the District of Columbia Housing Code. Petitioners sought declaratory and injunctive relief regarding the displacement of residents in the 14th Street Urban Renewal Area and relocation benefits.

In March 1973, the district court denied petitioners' request for a preliminary injunction, except with respect to compliance with NEPA for the second- and third-year Neighborhood Development Programs; however, the court stayed its injunction pending the filing of a final environmental impact statement. On June 8, 1973, the court of appeals denied petitioners' request that the stay be vacated or summarily reversed or that an injunction pending appeal be issued.

Petitioners sought additional preliminary injunctive relief in the district court, but on June 28, 1973, relief was denied on jurisdictional grounds. Furthermore, on July 2, 1973, that court dissolved the preliminary injunction which it had previously issued but stayed.[2] Petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. 1292(a)(1). On April 26, 1974, the court of appeals reversed in part and remanded certain aspects of the case to the district court for a hearing on petitioners' request for a preliminary injunction.

[2] On October 29, 1973 the district court also stayed all discovery pending the appeal (Pet. 5).

On August 1, 1973, while the interlocutory appeal was pending, Local Rule 1–13(b) of the district court became effective. The rule requires that class action motions be filed within ninety days after the filing of a complaint. Petitioners did not file their motion for class action certification under Fed. R. Civ. P. 23(b)(2) until June 10, 1974, some twenty months after filing their complaint and more than ten months after adoption of the rule. The district court denied this motion as untimely, relying upon the local rule and Fed. R. Civ. P. 23(c)(1), which requires that a class action determination must be made as soon as practicable after an action is commenced.[3] The trial court also denied petitioners' motion to take an immediate appeal from this order under 28 U.S.C. 1292(b).

The court of appeals dismissed petitioners' appeal (Pet. App. 1a) on the basis of *Williams* v. *Mumford*, 511 F. 2d 363 (C.A. D.C.), No. 74–1411,[4] certiorari

[3] In a footnote, the court noted its "serious misgivings" about whether petitioners could satisfy the prerequisites to maintenance of a class action imposed by Fed. R. Civ. P. 23(a).

[4] We opposed the granting of certiorari in that case (in this Court, the case was styled as *Joslyn N. Williams and Robert L. Bostick* v. *John G. Lorenz, Acting Librarian of Congress, et al.*, No. 74–1411). Since the district court there had authority under the statute (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. 2000e–16) to provide the full measure of requested injunctive relief despite the denial of class action certification, that denial could not affect the scope of the injunction; accordingly, Section 1292(a)(1) did not apply, regardless of whether that provision confers a right of appeal when the denial of a class action certification does have such an effect.

denied October 6, 1975, in which the court held that the denial of a motion for class action certification constitutes neither the issuance nor the denial of an injunction and is therefore not appealable as of right under 28 U.S.C. 1292(a)(1).

DISCUSSION

1. The question presented in this case is whether petitioners may appeal as of right under Section 1292 (a)(1) from an order of the district court denying certification of a class action under Fed. R. Civ. P. 23(b)(2), where that order allegedly has the effect of narrowing the scope of injunctive relief available should they ultimately prevail on the merits of the litigation (Pet. 7–8). In holding that Section 1292(a)(1) does not authorize such an appeal, the court below agreed with the position adopted by the Second Circuit in *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295, in which that court held that the refusal to certify a class action is neither the issuance nor the denial of an injunction and is therefore not immediately appealable as of right.

These decisions conflict with the rulings of at least three other courts of appeals. The Fourth Circuit held in *Brunson* v. *Board of Trustees,* 311 F. 2d 107, that where the district court dismissed the civil rights class action allegations as to all but the first named plaintiff, whose claim was moot, that order in effect denied the broad injunctive relief plaintiffs sought and was therefore appealable under Section 1292(a)(1). In *Yaffe* v. *Powers,* 454 F. 2d 1362, the First Circuit

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held that although the district court's order did not address plaintiffs' claim for injunctive relief against police harassment of political expression, its denial of class action treatment was appealable where the substantial effect of that order was to narrow considerably the scope of possible injunctive relief available should plaintiffs ultimately prevail on the merits. In *Price* v. *Lucky Stores, Inc.,* 501 F. 2d 1177, the Ninth Circuit held that the district court's dismissal of class action allegations of racial discrimination in employment was appealable under Section 1292(a)(1) because it constituted a denial of the broad injunctive relief plaintiffs sought on behalf of the class. See also *Hackett* v. *General Host Corp.,* 455 F. 2d 618, 622 (C.A. 3) (dictum), certiorari denied, 407 U.S. 925.

2. Appellate review in federal courts is, with limited exceptions,[5] restricted to final judgments[6] of the district courts in order to prevent the debilitating effects on judicial administration caused by piecemeal appellate consideration of what is, in essence, a single controversy. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 170.

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[5] See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (collateral orders). Several courts of appeals have sanctioned immediate appeals from the denial of class action certification under Fed. R. Civ. P. 23 (b)(3) where, as a practical matter, the refusal to certify sounded the "death knell" for the entire action, and thus constituted an appealable final order under 28 U.S.C. 1291. *E.g.*, *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (C.A. 2), certiorari denied, 386 U.S. 1035.

[6] The final judgment rule is presently codified in 28 U.S.C. 1291. Its precursors can be traced directly to the Judiciary Act of 1789, 1 Stat. 73, 84.

As an express exception to the rule of finality, however, 28 U.S.C. 1292(a)(1) provides that the courts of appeals have jurisdiction to review interlocutory orders of the district courts "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," except where direct review may be had in this Court.[7]

In the instant case, after remand petitioners did not renew and the district court did not pass upon their claim for injunctive relief. Their motion for class action certification was dismissed for failure to satisfy procedural rules of timeliness, without regard to the merits of the underlying claim. Furthermore the district court's order denying certification under subsection (b)(2) can be fully reviewed on appeal from the final judgment. Appellate consideration based upon petitioners' allegation that the refusal to certify class action status considerably narrowed the scope of possible permanent injunctive relief would constitute an unwarranted judicial expansion of the statutory language. See *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23; *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176.

Nothing in the interlocutory appeals statute or Rule 23 justifies allowing an appeal as of right from the denial of a subsection (b)(2) class action motion. That the scope of final relief might be affected cannot serve as a basis for invoking Section 1292(a)(1). Such a principle, if accepted, would permit two

[7] See 28 U.S.C. 1253, in regard to interlocutory appeals from orders of three-judge district courts granting or denying injunctive relief.

separate invocations of the appellate process before the merits are reached in subsection (b)(2) class actions seeking preliminary injunctive relief. Furthermore, it would encourage piecemeal appeals of pretrial rulings in virtually all actions for injunctive relief, since innumerable orders affect the scope of the remedy available to the prevailing party.[8] The district court's dismissal of all claims against one defendant, for example, could dramatically narrow the scope of relief available to plaintiffs in a subsection (b)(2) class action. But permitting an immediate interlocutory appeal of this order under Section 1292(a)(1) would seemingly eliminate the necessity of obtaining a certificate under Fed. R. Civ. P. 54(b) before perfecting the appeal.

Moreover, there is no need for such a rule since in 28 U.S.C. 1292(b), Congress has provided a mechanism for review of interlocutory orders, such as the denial of class action motions, which would not otherwise be appealable under Section 1292(a)(1) or Section 1291. We are thus concerned here only with orders that would not qualify for appeal under Section 1292(b)[9]—orders that do not involve a control-

[8] The question naturally arises whether defendants could appeal as of right from an order certifying a subsection (b)(2) class action, since the scope of possible relief would be affected thereby. The Second Circuit's difficulties in propounding rules governing appeals of orders granting class action status under subsection (b)(3) illustrate the compexity of this problem. See, *e.g.*, *General Corp.* v. *City of New York*, 501 F. 2d 639.

[9] As pointed out at p. 3, *supra*, the district court denied petitioners' motion for an immediate appeal of the class action ruling under Section 1292(b).

ling question of law about which there are substantial differences of opinion and in regard to which an immediate appeal could not materially advance ultimate termination of the litigation. There is, we submit, no reason to expand appellate jurisdiction under Section 1292(a)(1) to accommodate such cases.

We thus believe that the decision below was correct and that the district court's order should not have been immediately appealable absent a Section 1292 (b) certification. However, in light of the conflict among the circuits, the recurrent nature of this problem, and the importance of determining the appropriate scope of federal appellate jurisdiction, we do not oppose the petition for a writ of certiorari.

Respectfully submitted.

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